UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	**CASE NO. 10-35770**
John H. Hamilton, Sr.,	§	**(Chapter 7)**
Debtor.	§	

City Bank,	§	
Plaintiff,	§	
	§	
vs.	§	**Adv. Pro. No. 10-________**
	§	
John H. Hamilton, Sr.,	§	
Defendant	§	

COMPLAINT OBJECTING TO DISCHARGE PURSUANT TO 11 U.S.C § 727 AND SEEKING A DETERMINATION OF NON-DISCHARGEABILITY PURSUANT TO 11 U.S.C. § 523

TO THE HONORABLE JEFF BOHM, UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Plaintiff, City Bank ("City Bank" or "Plaintiff"), and files this Complaint Objecting to Discharge Pursuant to 11 U.S.C. § 727 and Seeking a Determination of Non-Dischargeability Pursuant to 11 U.S.C. § 523 against John H. Hamilton, Sr. (the "Debtor" or "Defendant") in the above-referenced bankruptcy proceeding (the "Bankruptcy Case"), and would show the Court as follows:

I.
JURISDICTION AND VENUE

1. This Court has jurisdiction over this proceeding (the "Adversary Proceeding") pursuant to 28 U.S.C. §§ 157(b) and 1334 in that this Adversary Proceeding is filed under 11 U.S.C. §§ 523 and 727. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b).

2. Venue is proper in this district pursuant to 28 U.S.C. § 1409.

II.
PARTIES AND SERVICE

3. City Bank is a Texas banking association conducting business at 5219 City Bank Parkway, Lubbock, Texas 79407.

4. Debtor is an individual resident of Fort Bend County, and may be served with process at his residence, 36710 Cavalry, Simonton, Texas 77476, with a courtesy copy to his counsel of record, Calvin C. Braun, Orlando & Braun, LLP, 3401 Allen Parkway, Suite 101, Houston, Texas 77019.

III.
BACKGROUND FACTS

5. In this Adversary Proceeding, City Bank seeks to determine the Debtor's ability to obtain a discharge based on the Debtor's false oaths in his Bankruptcy Case, as well as other conduct which is described in 11 U.S.C. § 727.

6. Alternatively, City Bank also seeks to determine the dischargeability of the balance due under the State Court Judgment (defined below) based on the Debtor's: (a) fraudulent representations in connection with the Notes (as defined below) and submission of fraudulent financial statements to City Bank in connection with the Notes (as defined below) and Guaranties (as defined below) which extend credit to the Debtor or affiliates of the Debtor; (b) obtaining funding of progress payments under false pretenses through the submission of draw request that contained misrepresentations, where the Debtor did not use the money represented by the draw requests for the intended purpose.

A. The Loan Transactions Between the Debtor and City Bank

7. Prior to the petition date, the Debtor was generally in the real estate development business, involved in multi-million dollar projects across the Southwest. To this end, the Debtor

sought to have City Bank finance Ruidoso Texas, Ltd. ("Ruidoso Texas"), one of the Debtor's real estate development companies. On or about February 11, 2005, Ruidoso Texas executed that certain promissory note ("Note 1") made payable to First American Bank in the original principal sum of $17,800,000.00. City Bank is the owner and holder of Note 1 and is entitled to receive all money due under the terms thereunder.

8. On or about February 11, 2005, the Debtor, as the sole owner of Ruidoso Texas, executed a guaranty in favor of First American Bank guarantying the payment in full of all indebtedness of Ruidoso Texas under Note 1 ("Guaranty 1"). City Bank is the owner and holder of Guaranty 1 and is entitled to enforce it according to the terms thereof.

9. Ruidoso Texas defaulted on Note 1 and City Bank subsequently accelerated the maturity of the debt and foreclosed on all property pledged as collateral security for the payment of Note 1.

10. On or about September 24, 2007, Ruidoso Texas executed that certain promissory note ("Note 2") made payable to City Bank in the original principal sum of $601,359.73. City Bank is the owner and holder of the Note 2 and is entitled to receive all money due under the terms thereunder.

11. On or about September 24, 2007, the Debtor executed a guaranty in favor of City Bank guarantying the payment in full of all indebtedness of Ruidoso Texas under Note 2 ("Guaranty 2"). City Bank is the owner and holder of Guaranty 2 and is entitled to enforce it according to the terms thereof.

12. Ruidoso Texas defaulted on Note 2 and City Bank subsequently accelerated the maturity of the debt and foreclosed on all property pledged as collateral security for the payment of Note 2.

13. On or about October 1, 2008, RRC No. 4 Homeowners' Association ("RRC No. 4"), a New Mexico non-profit corporation formed as the condominium association for the project Ruidoso Texas was developing, executed that certain promissory note ("Note 3," and together wit Note 1 and Note 2, the "Notes") in favor of City Bank in the original principal sum of $125,000.00. City Bank is the owner and holder of Note 3 and is entitled to receive all money due pursuant to its terms.

14. On or about October 1, 2008, the Debtor executed a guaranty in favor of City Bank guarantying the payment in full of all indebtedness of RRC No. 4 under Note 3 ("Guaranty 3," and together with Guaranty 1 and Guaranty 2, the "Guaranties"). City Bank is the owner and holder of Guaranty 3 and is entitled to enforce it according to the terms of the same.

15. RRC No. 4 defaulted on Note 3 and City Bank accelerated the maturity of the debt and foreclosed on all property pledged as collateral security for payment of Note 3.

16. On May 12, 2010, City Bank obtained a default judgment against the Debtor with respect to Guaranty 1, Guaranty 2 and Guaranty 3. Specifically, in the case styled *City Bank v. John H. Hamilton*, Cause No. 2009-550, 115; the 99th District Court for Lubbock County, Texas (the "State Court"), the State Court entered a default judgment (the "State Court Judgment") against the Debtor in the amount of $8,740,201.23 plus interest (as specified in the loan documents discussed more fully below) through entry of the Judgment and post-Judgment interest at a rate of five percent (5%) per annum.

17. As part of its financing of the Debtor's wholly owned company's real estate development project and operations, City Bank took the personal Guaranties of the Debtor (collectively, the "Borrowers"). In that regard, the Debtor, at various times and intervals, provided financial information of himself and of his various and voluminous entity structure, to

City Bank (the "Financial Statements"). These Financial Statements contained statements about the Debtor's net worth, cash holdings, and other financial information. On information and belief, each of the Financial Statements contained false representations and were provided to City Bank with the intent to deceive City Bank regarding his ability to satisfy his obligations under the personal guaranty as part of City Bank's loans to the Borrowers. City Bank relied on the Financial Statements in extending funds under the Notes. Over a period of time, City Bank advanced the full face amount of the Notes to the Debtor.

18. Without limiting the foregoing, on information and belief, the Financial Statements provided by the Debtor to City Bank contained false information about his personal holdings, cash holdings, the value, extent and nature of his personal non-exempt property, the amount of his total net worth, and other false information.

19. Additionally, as part of the Transaction, the Debtor on behalf of himself as Guarantor, and on behalf of Ruidoso Texas (as Sole Manager of the limited liability company formed to serve as the general partner of the limited partnership) signed various Loan Agreements (the "Loan Agreements") which contained numerous representations and warranties concerning the financial condition of Ruidoso Texas, the project and Debtor as Guarantor. These included promises that the loan proceeds would be used only for the intended purpose set forth in the Loan Agreements, and that the Debtor's and Ruidoso Texas' financial condition was accurately represented on the financial documents submitted to City Bank. On information and belief, each of the Loan Agreements contained false representations and were provided to City Bank with the intent to deceive City Bank regarding his ability to satisfy his obligations under the personal guaranty as part of City Bank's loans to the Borrowers.

B. Debtor's Affiliate's Construction Project

20. The Debtor retained Construction Services Technology ("CST") as the general contractor to develop and construct the Ruidoso Retail condominium project in Ruidoso, New Mexico. In addition, the Debtor formed Conserv Tech, LLC ("ConServ Tech"), an entity owned and controlled by the Debtor, to serve as a "master subcontractor" to CST. Upon information and belief, draw requests, submitted to City Bank in connection with the Loan Agreement (as defined below) made by ConServ Tech contained fraudulent representations regarding the intended uses and/or recipients of the respective advances to the Debtor, in the event that it is determined that the Borrower did not use the monies advanced by City Bank for the intended purposes under the Loan. It was City Bank's practice, on the request of the borrower, which was solely owned and operated by the Debtor, or the general contractor entity owned and operated by the Debtor, to advance monies under its Loan Agreements to the Debtors bank account at CitiBank, N.A. (not the Plaintiff). As part of this lawsuit, City Bank requests an accounting of its monies advanced to the Debtor's affiliates to ensure that its advances were spent on appropriate and intended purposes.

C. The Debtor's False Oaths

21. The Debtor filed his petition for relief under title 11 of the United States Code, 11 U.S.C. §§ 101, et. seq. (the "Bankruptcy Code") on July 6, 2010 (the "Petition Date"), and on July 20, 2010, filed his first set of Schedules and Statement of Financial Affairs (the "Original Schedules") [Docket No. 11].

22. In the Original Schedules, the Debtor listed every or almost every debt, even on agreed judgments, as contingent, disputed and unliquidated. The Original Schedules were later amended on August 12, 2010, to reflect, among other things, that certain creditors' claims were

not contingent, not disputed and were not unliquidated (the "Second Amended Schedules") [Docket No. 45]. At the initial Scheduling Conference in this case, the Debtor admitted under oath that he had no basis to list all debts as disputed or contingent. Based on the foregoing, the Debtor's Original Schedules were a false oath.

23. The Debtor, in Schedule J of the Debtor's Conversion Schedules and Statement of Financial Affairs, lists that his average monthly expenses total $4,936.00 ("Schedule J"). Specifically, the Debtor lists the following expenditures: (a) $750.00 for rent or home mortgage payment; (b) $450.00 for food; and (c) an aggregate of $340 for electricity, water and sewer, telephone and cable.

24. On information and belief, from a review of the Oral Deposition of Patricia Hamilton (the Debtor's current spouse from whom he is divorcing), the Debtor resides with Patricia Hamilton in a home that they rent and the Debtor does not make the rental payment. Patricia Hamilton, and not the Debtor, pays for their food. Similarly, Patricia Hamilton, and not the Debtor, pays for the electricity, water and sewer, telephone and cable bills for the rental home in which the Debtor and Patricia Hamilton reside. Based on the foregoing, the Debtor's Schedule J is a false oath.

D. Unexplained Loss of Assets and Fraudulent Transfers

25. On information and belief, the Debtor may have been transferring, removing, destroying or concealing property of the Debtor within the one year prior to bankruptcy. The basis for this belief is the oral deposition of Debtor's spouse, which details a pattern and practice of the Debtor transferring cash to his spouse, and her practice of purchasing property in her name. At the time of these transactions, the Debtor was insolvent or was engaged in business transactions for which the Debtor incurred debts which would be beyond the Debtor's ability to

pay. These transactions, to the extent that they occurred prior to City Bank's loans being fully funded, may also have represented false representations under the Loan Agreements. Such transactions, to the extent the same occurred within one year of the bankruptcy filing, represent conduct that is grounds to deny discharge.

26. To the extent the Debtor was making transfers to his wife as described in Ms. Hamilton's deposition, and in the Trustee's adversary proceeding to recover the same, the Debtor has still not adequately explained the loss of several millions of dollars that is detailed on his personal financial statements. At this juncture, the full extent of the Debtor's transition from a multi-millionaire on his balance sheets, to the pauper portrayed in this bankruptcy, is yet unexplained.

IV.
COUNT 1--11 U.S.C. § 727(a)(4)

27. City Bank hereby incorporates by reference for all purposes each of the allegations contained in paragraphs one (1) through twenty-six (26).

28. City Bank seeks a determination of that the Debtor should not receive a discharge pursuant to Section 727(a)(4) of the Bankruptcy Code, which provides that no discharge is available to the Debtor where he made a false oath. City Bank submits that the Debtor made a false oath regarding the nature of the claims of the Debtor's in his Original Schedules. City Bank further submits the Debtor made a false oath regarding his monthly expenditures in Schedule J, as well as other false oaths contained in his original bankruptcy schedules.

29. Accordingly, the Debtor should be denied a discharge pursuant to the provisions of Section 727(a)(4) of the Bankruptcy Code.

V.
COUNT 2--11 U.S.C. § 727(a)(2)

30. City Bank hereby incorporates by reference for all purposes each of the allegations contained in paragraphs one (1) through twenty-six (26).

31. Pursuant to 11 U.S.C. § 727(a)(2) the Debtor can be denied a discharge if: "the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition;

32. City Bank seeks a determination of that the Debtor should not receive a discharge pursuant to Section 727(a)(2) of the Bankruptcy Code. City Bank submits that the Debtor, with the intent to hinder, delay or defraud creditors, transfer transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--(A) property of the debtor, within one year before the date of the filing of the petition to the extent his transfers to his spouse continued to that period, or to the extent further discovery reveals additional transfers or concealments of assets to explain the Debtor's loss of assets.

33. Accordingly, the Debtor should be denied a discharge pursuant to the provisions of Section 727(a)(4) of the Bankruptcy Code.

VI.
COUNT 3--11 U.S.C. § 727(a)(5)

34. City Bank hereby incorporates by reference for all purposes each of the allegations contained in paragraphs one (1) through twenty-six (26).

35. Pursuant to 11 U.S.C. § 727(a)(5) the Debtor can be denied a discharge if: "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities."

36. City Bank seeks a determination of that the Debtor should not receive a discharge pursuant to Section 727(a)(5) of the Bankruptcy Code. City Bank submits that a this juncture, the full extent of the Debtor's transition from a multi-millionaire on his balance sheets, to the pauper portrayed in this bankruptcy, is yet unexplained, or at least has not been explained satisfactorily.

37. Accordingly, the Debtor should be denied a discharge pursuant to the provisions of Section 727(a)(5) of the Bankruptcy Code.

VII.
COUNT 4—11 U.S.C. § 523(a)(2)(B)

38. City Bank hereby incorporates by reference for all purposes each of the allegations contained in paragraphs one (1) through twenty-six (26).

39. City Bank submits that as an alternative to denying the Debtor a discharge, his debt to City Bank should be declared non-dischargeable pursuant to Section 523(a)(2)(B). City Bank submits the Debtor made use of a statement in writing that was materially false, respecting the Debtor's financial condition, on which City Bank reasonably relied, and was issued by the Debtor with the intent to deceive. These included the representations in writing in the Loan Agreements and in the Financial Statements.

40. In fact, City Bank extend funds to the Borrowers based on the submission of materially false financial statements respecting the Debtor's personal holdings, the value, extent and nature of his personal non-exempt property, the amount of his total net worth, and other false information. The Debtor submitted the Financial Statements to City Bank with an intent to

deceive City Bank and City Bank reasonably relied on these representations to advance funds under the Notes.

41. Accordingly, the Debtor should be denied a discharge of City Bank's debt pursuant to the provisions of Section 523(a)(2)(B) of the Bankruptcy Code.

VIII.
COUNT 5—11 U.S.C. § 523(a)(2)(A)

42. City Bank hereby incorporates by reference for all purposes each of the allegations contained in paragraphs one (1) through twenty-six (26).

43. City Bank submits that as an alternative to denying the Debtor a discharge, his debt to City Bank should be declared non-dischargeable pursuant to Section 523(a)(2)(A). City Bank submits that the Debtor obtained money through false pretense, false representation or actual fraud.

44. The Borrowers, City Bank and the Debtor, as guarantor, entered into that certain Loan Agreement on October 1, 2008 (the "Loan Agreement"). The Loan Agreement provided that the proceeds of the Notes were to be used to pay "certain existing unpaid debtors of the Borrower relating to construction of the River Crossing at Ruidoso project" and "to pay ordinary operating expense of [RRC No. 4] as approved by [City Bank] from time to time."

45. Upon information and belief, draw requests, submitted to City Bank in made by ConServ Tech contained fraudulent representations regarding the intended uses and/or recipients of the respective advances to the Debtor.

46. Accordingly, the Debtor should be denied a discharge of City Bank's debt pursuant to the provisions of Section 523(a)(2)(A) of the Bankruptcy Code.

IX.
COUNT 6—11 U.S.C. § 523(a)(4)

47. City Bank hereby incorporates by reference for all purposes each of the allegations contained in paragraphs one (1) through twenty-six (26).

48. City Bank submits that as an alternative to denying the Debtor a discharge, his debt to City Bank should be declared non-dischargeable pursuant to Section 523(a)(4). 11 U.S.C. §523(a)(4) provides as follows:

> (a) A discharge under section 727…of this title does not discharge an individual debtor from any debt – . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;…

49. In addition to the actions cited above, if an accounting shows that the Debtor misappropriated the funds requested by the Debtor or his affiliates in connection with the draw requests, then City Bank submits that the Defendant fraudulently appropriated draws made by City Bank to Debtor or his affiliates for the purpose of paying subcontractors and costs of incurred in the Ruidoso project, when such amounts were entrusted to Debtor (or an affiliate of the Debtor controlled by the Debtor) constitute acts of embezzlement under Texas law. As such, City Bank asserts that the Debtor's indebtedness, up to the amount it is determined Debtor embezzled from City Bank, should not be discharged pursuant to 11 U.S.C. §523(a)(4).

X.
COUNT 7—11 U.S.C. § 523(a)(6)

50. City Bank hereby incorporates by reference for all purposes each of the allegations contained in paragraphs one (1) through twenty-six (26).

51. City Bank submits that as an alternative to denying the Debtor a discharge, his debt to City Bank should be declared non-dischargeable pursuant to Section 523(a)(6). 11 U.S.C. §523(a)(6) provides as follows:

> (a) A discharge under section 727…of this title does not discharge an individual debtor from any debt – . . .
>
> > (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;…

52. In addition to the actions cited above, if an accounting shows that the Debtor misappropriated the funds requested by the Debtor or his affiliates in connection with the draw requests, rather than paying such subcontractors, constitutes a willful and malicious injury by the Debtor to City Bank. On information and belief, the Debtor or his solely controlled affiliates may not have used the money for the purpose expressly given by City Bank. As such, City Bank asserts that the Debtor's indebtedness, up to the amount it is determined Debtor used for improper purposes from City Bank, should not be discharged pursuant to 11 U.S.C. §523(a)(6).

WHEREFORE, PREMISES CONSIDERED, City Bank prays that the Court enter an order determining that the Debtor be exempted from discharge pursuant to 11 U.S.C. § 727(a)(2), (4) and/or (5) and that the obligations of the Debtor to City Bank are non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(B) and 523(a)(2)(A) and/or 523(a)(4) or (6); and for such other and further relief as the Court deems just and proper.

Dated: January 14, 2011

Respectfully Submitted,

MULLIN HOARD & BROWN, LLP
M. Andrew Stewart, SBN: 24037554
P. O. Box 2585
Lubbock, Texas 79408-2585
Tel: (806) 765-7491
Fax: (806) 765-0553

By: /s/ M. Andrew Stewart
M. Andrew Stewart
Attorneys for City Bank